Supreme Court, U. S.
FILED
OCT 22 1976
MICHAEL RODAK, JR., CLERK

Nos. 76-1 and 76-11

In the Supreme Court of the United States

OCTOBER TERM, 1976

W. W. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly withdrew from the jury's consideration an unnecessary portion of one charge in the indictment.

2. Whether, under the Hobbs Act, 18 U.S.C. 1951, a public officeholder acts "under color of official right" when he induces the payment of money to him in return for the corrupt use of his public office to influence the official action of a public agency of which he is not a member.

3. Whether the courts below correctly found that a juror who temporarily became ill after the jury had retired for deliberations was neither physically nor mentally incapacitated.

4. Whether the district judge properly communicated with the ill juror's physician in order to determine her medical condition.

5. Whether the district court's *voir dire* of prospective jurors was adequate to test their impartiality in light of pretrial publicity concerning the case.

6. Whether the district court should *sua sponte* have excluded testimony by a co-defendant concerning his plea of guilty to one charge of the indictment and whether the court adequately instructed the jury that a co-defendant's plea of guilty is not evidence of another defendant's guilt.

7. Whether the district court adequately instructed the jury concerning petitioner Taylor's theory of his defense.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner Hall (No. 76-11) was convicted of attempted extortion in violation of the Hobbs Act, 18 U.S.C. 1951 (Count I); conspiracy to violate the Travel Act, 18 U.S.C. 1952, by traveling in interstate commerce with intent to facilitate the unlawful bribery of a public official (Count II); and two counts charging substantive violations of the Travel Act (Counts III and IV). Petitioner Taylor (No. 76-1) was also convicted of the conspiracy charge (Count II) and two substantive violations of the Travel Act (Counts V and VI).[1]

[1] R. Kevin Mooney was indicted as a co-defendant in Count II of the indictment. Prior to trial he pleaded guilty to that charge and subsequently testified as a witness for the government.

Petitioner Hall was sentenced to concurrent terms of three years' imprisonment on each count. Petitioner Taylor was sentenced to concurrent terms of eighteen months' imprisonment on each count. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

The evidence showed that petitioner Hall (who was at all pertinent times the Governor of Oklahoma) extorted approximately $50,000 from petitioner Taylor and his associate, R. Kevin Mooney, in return for Hall's efforts to influence the official approval of an investment plan that Taylor sought to sell to the Oklahoma Public Employees Retirement System. After Taylor had agreed to pay Hall what he demanded, both Hall and Taylor conspired to bribe certain Oklahoma public officials to ensure the success of the plan. See Pet. App. 2a-6a.

ARGUMENT

1. Count II of the indictment charged petitioners with conspiracy to violate the Travel Act, 18 U.S.C. 1952,[2] by traveling in interstate commerce with intent to promote a scheme to bribe public officials in violation of Oklahoma law, specifically 21 Okla. Stat. 381 and 382.[3] Counts III and IV charged petitioner Hall, and Counts V and VI charged petitioner Taylor, with substantive violations of the Act, similarly alleging that both Oklahoma statutes had been violated.

After a jury had been empanelled, but before evidence had been taken, the district court ruled that the indictment's references to 21 Okla. Stat. 382 (accepting a bribe)

[2] 18 U.S.C. 1952 makes it a crime to travel in interstate commerce with intent to promote or carry on certain unlawful activities, including bribery in violation of state law.

[3] 21 Okla. Stat. 381 prohibits bribing a public officer, and 21 Okla. Stat. 382 prohibits the acceptance of such a bribe.

were surplusage and that the allegations concerning 21 Okla. Stat. 381 (giving a bribe) were sufficient to charge a violation of the Travel Act. The court therefore did not read that portion of the charge to the jury, nor did it instruct them on it.

Petitioners contend (Hall Pet. 15-24; Taylor Pet. 6-8) that the court's action constituted an impermissible amendment of the indictment. The contention is fully answered in the opinion of the court of appeals, which correctly held that neither petitioner was prejudiced by the court's reduction of the charges against them (Pet. App. 8a-11a).

By charging a violation of the Travel Act founded on violations of two Oklahoma statutes, the grand jury necessarily found that probable cause existed to warrant recitation of both of the statutes in the indictment. By deleting reference to one of those statutes, the trial court did no more than withdraw a charge from the jury's consideration, and it is not material whether it did so as a deletion of surplusage or because it did not believe that the charge would be sustained by the evidence. The indictment was in no way enlarged by the court's decision, and it is undisputed that the remaining language charged petitioners with a violation of the Travel Act. They were fully apprised of the charges against them and suffered no prejudice on account of the court's withdrawal of an unnecessary charge from the jury's consideration.

2. Petitioner Hall contends (Pet. 7-15) that he cannot properly be convicted of extortion "under color of official right" because he was neither a member of the Board of Trustees of the Oklahoma Public Employees Retirement System nor entitled, as Governor, to participate in the Board's investment decisions. But, as the court of appeals correctly held, the statute is aimed at "the wrongful use of official power" (Pet. App. 12a) regardless of whether

the power exercised is *de jure* or *de facto*. "So long as the motivation for the payment focuses on the recipient's office"—that is, so long as the acts to be performed "can only be undertaken because of his official position"—then "the conduct falls within the ambit of 18 U.S.C. §1951" even if the acts are "unrelated to his [official] duties * * *." *United States* v. *Braasch*, 505 F. 2d 139, 151 (C.A. 7) (Mr. Justice Clark), certiorari denied, 421 U.S. 910. The facts here plainly satisfy that standard (see Pet. App. 13a).

As Hall himself recognizes (Pet. 12-14), the other courts of appeals that have considered the question are in accord with *Braasch*.[4] To exclude from the statute's prohibition the "obtaining [of] money by a public officer for a service not within the scope of his official duties" (Pet. 9) would unjustifiably eviscerate the Act and create a loophole not intended by Congress. The courts of appeals have properly rejected such efforts to weaken the Hobbs Act, and review by this Court is not warranted.

3. Petitioner Hall argues (Pet. 24-40) that the district court should have ordered a mistrial when one juror became ill during deliberations. He contends that the juror's ingestion of drugs prescribed by her physician influenced her consideration of the case and deprived petitioner of his right to an impartial jury.

Whether the juror's illness or her ingestion of prescription drugs affected her capacity to render an impartial verdict is a matter that was fully explored by

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[4]See, *e.g.*, *United States* v. *Trotta*, 525 F. 2d 1096, 1100 (C.A. 2), certiorari denied, No. 75-1032, May 19, 1976; *United States* v. *Mazzei*, 521 F. 2d 639, 643 (C.A. 3, *en banc*), certiorari denied, 423 U.S. 1014; *United States* v. *Price*, 507 F. 2d 1349 (C.A. 4); *United States* v. *Staszcuk*, 517 F. 2d 53 (C.A. 7, *en banc*), adopting by reference on this point the panel's opinion (502 F. 2d 875), certiorari denied, 423 U.S. 837.

both courts below (Pet. App. 15a-20a, 53a-63a). The district court found, both at the time of the event and on petitioner's subsequent motion for a new trial, that "the juror was capable of rendering satisfactory jury service" (Pet. App. 57a). The court of appeals correctly sustained that finding, specifically rejecting petitioner's contentions that the juror was physically and mentally incapable of rendering an impartial verdict (Pet. App. 18a-19a). There is no reason for this Court further to review this factual issue.

4. In a related contention, petitioner Hall argues (Pet. 40-42) that the district judge acted improperly when he communicated with the ill juror's physician to determine her condition. The impropriety, according to petitioner, is that the communication took place out of his presence and amounted to coercion of the physician to allow the juror to return to jury service. The court of appeals correctly answered both points (Pet. App. 21a):

> The trial judge was faced with a difficult situation which made it necessary that he communicate with the doctor and through the doctor with the juror in order to ascertain her condition. The judge was the person best qualified to carry out the inquiry. We see no impropriety in the judge's communicating with the juror through the doctor. What was said does not add up to pressure. * * * [T]he trial court was careful and conscientious in dealing with a most difficult problem.

Moreover, since the district court, within hours of the communication with the physician, held a hearing at which petitioner was allowed fully to develop the circumstances surrounding the communication, any error related to the communication itself could not have

affected petitioner's substantial rights. See *United States* v. *Arriagada*, 451 F. 2d 487 (C.A. 4); *Ware* v. *United States*, 376 F. 2d 717 (C.A. 7); *Walker* v. *United States*, 322 F. 2d 434 (C.A. D.C.), certiorari denied, 375 U.S. 976.

5. Petitioner Hall next contends (Pet. 42-49) that the district court's *voir dire* of prospective jurors was inadequate to ensure that pretrial publicity did not infect the jury's consideration of the case, because the court declined to question the prospective jurors separately and refused to ask all the questions proposed by petitioner.

The district court asked 19 or 20 questions of the jury array, including (as summarized by the court of appeals) "whether anyone had read or heard any news accounts of the case; whether anyone had discussed it with persons outside the family; if there had been any discussion within the immediate family and was the juror the object of persuasion by family members; if anyone had formed an opinion; if anyone knew of any reason why she or he could not be fair and impartial; if they could put aside anything they had read, been told, or heard about the case" (Pet. App. 23a). The district court determined that, although all but one of the original 12 jurors had been exposed to news accounts of the case, none had discussed it with persons outside the family and none had been the object of persuasion (*ibid.*). Two jurors who stated that they had formed an opinion were dismissed (*ibid.*).

Conduct of the *voir dire* is committed to the sound discretion of the district court. *E.g.*, *Ristaino* v. *Ross*, 424 U.S. 589, 594-595; Fed. R. Crim. P. 24(a). The court of appeals here correctly concluded that the district court did not abuse its discretion. "[W]hile the [district] court's questions were not so numerous as [Hall's]

submissions and were not as detailed, they contained the substance of Hall's proposed inquiries * * * [and] were sufficient to test [the jurors'] impartiality" (Pet. App. 24a). The district court "was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner" (*Ham* v. *South Carolina,* 409 U.S. 524, 527).

Nor was the court required, in the circumstances of this case, to question the jurors individually. Unlike the situation in *Silverthorne* v. *United States,* 400 F. 2d 627 (C.A. 9), appeal after remand, 430 F. 2d 675 (C.A. 9), certiorari denied, 400 U.S. 1022, on which Hall relies, there was here no "massive, inflammatory publicity [that] created a hostile climate requiring extremely close scrutiny of the jurors" (Pet. App. 26a). The court of appeals properly found on this record that, "although all of the jurors had heard about the case, the judge's questions, his excusing of those with opinions, and their statements of impartiality were sufficient to assure Hall's being tried by an impartial jury" (*ibid.*). Petitioner's disagreement with the court of appeals' factual assessment presents no issue warranting review by this Court.

6. Petitioner Hall also contends (Pet. 49-54) that he was denied a fair trial because the prosecutor questioned R Kevin Mooney about his plea of guilty to Count II of the indictment, questioned Hall about Mooney's plea, and referred to the plea during summation. Since Hall did not object at trial to any of these references to Mooney's guilty plea, his contention must be considered in light of the plain error standard of Rule 52(b), Fed. R. Crim. P.

During the government's direct examination of R. Kevin Mooney, the prosecutor elicited from him that he had been

charged as a co-defendant with Hall and Taylor in Count II for conspiring to violate the Travel Act and that he had pleaded guilty to that charge in return for the government's agreement to drop other charges against him (Tr. 303-304). Later, during cross-examination of Hall, the prosecutor again referred to Mooney's guilty plea. Hall's theory of defense was that he was the victim of a "conspiracy" to "set him up" involving the FBI, the United States Attorney, the Oklahoma Attorney General, the Internal Revenue Service and others. He stated his belief that Mooney, although not originally one of the members of that "conspiracy," had joined it in return for the government's agreement to accept his guilty plea. Hall stated that he believed that, in furtherance of the conspiracy against him, Mooney had "testified falsely" (Tr. 1675) and had pleaded guilty to the conspiracy charge notwithstanding that he was guilty only of offering a bribe (Tr. 1388-1390, 1675). The prosecutor asked whether Hall believed that Mooney would plead guilty to a felony and suffer disbarment in order to assist in furthering this conspiracy against petitioner (Tr. 1677-1678). Finally, during his summation to the jury, the prosecutor again referred to the conspiracy of which Hall complained and to Hall's assertion that Mooney had pleaded guilty in furtherance of that conspiracy (Tr. 2187-2188).

The district court instructed the jury that a co-defendant's guilty plea should not be considered "evidence of [a defendant's] guilt" and "gives rise to no inference against" a defendant at trial (Tr. 2271).[5]

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[5]Although the transcription omitted several critical words, so that the instruction appears garbled (see Pet. 54), there is no serious question that the district court in fact instructed the jury as indicated in the text.

When, as in this case, a co-defendant is known to the jury and is referred to throughout the trial but does not appear as an accused, it is permissible for the prosecution to introduce testimony that explains that absence, so long as there is a proper cautionary instruction, as there was here, that a co-defendant's plea of guilty does not constitute evidence against the defendants on trial. *E.g.*, *Smith* v. *United States*, 331 F. 2d 265 (C.A. 8), certiorari denied, 379 U.S. 824; *Krueger* v. *United States*, 331 F. 2d 283, 286 (C.A. 8), certiorari denied, 379 U.S. 879; *United States* v. *Soares*, 456 F. 2d 431 (C.A. 10). The prosecutor's questions of petitioner and remarks during summation concerning Mooney's plea properly probed and discredited petitioner's contention that he was a victim of a conspiracy to frame him.

In these circumstances, Hall has not demonstrated that the district court erred, much less that it committed plain error, in its handling of the evidence concerning Mooney's guilty plea.

7. Petitioner Taylor contends (Pet. 5-6) that the district court erred in refusing to give one of his requested instructions concerning his theory of the case. The contention was thoroughly considered and correctly rejected by the court of appeals (Pet. App. 33a-35a), on whose opinion we rely. As the court correctly concluded, "[t]he instructions here were sufficient and comprehensive" and "correctly stated the law with respect to both belief and specific intent," the issues upon which Taylor's defense turned (Pet. App. 35a).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1976.

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